TIGER POWERHITZ SDN BHD

v.

GUINNESS ANCHOR MARKETING SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ARIFIN ZAKARIA J
[CIVIL SUIT NO: S3-22-509-2000]
7 JUNE 2002

CIVIL PROCEDURE: *Judgments and orders - Setting aside, application for - Service - Whether there was personal service - Rules of the High Court 1980, O. 45 r. 7(3)(a) - Whether order contained proper endorsement - Whether alleged contemnor guilty of contempt of order*

CIVIL PROCEDURE: *Contempt of court - Breach of court order - Whether alleged contemnor could be held for contempt of injunction order*

By an *ex parte* injunction order ('Order'), this court had previously prohibited the defendant from using the name 'Tiger Powerhitz' in several concerts and events at stipulated venues. On 30 November 2001, the plaintiff obtained an *ex-parte* order from this court for leave to institute contempt proceedings against the defendant company's director ('the alleged contemnor') for breach of the said injunction order. This was the defendant's and alleged contemnor's application to set aside the order dated 30 November 2001, heard together with the plaintiff's notice of motion for committal proceedings.

Held:

[1] The alleged contemnor had not been personally served with the Order as required under O. 45 r. 7(3)(a) Rules of the High Court 1980, nor had he been given the appropriate notice. Furthermore, the Order did not contain the proper endorsement as required by O. 24 r. 7(4) and Form 87 of the Rules of the High Court 1980. Therefore, the alleged contemnor could not be held for contempt of the injunction order. (pp 80 d & 81 e-g)

[2] The defendant had taken all the necessary measures to ensure compliance with the injunction order the moment the defendant was made aware of the said Order. However, due to shortage of time, the defendant's acts which were complained of by the plaintiff, could not be stopped. This factor, coupled with the fact that the plaintiff was guilty of inordinate delay in filing the said application for leave, clearly weighed against the plaintiff's favour. (pp 83 g-h & 84 c)

[Application allowed. Plaintiff's notice of motion struck out.]

Case(s) referred to:

Class One Video Distributors Sdn Bhd & Anor v. Chanan Singh Sher Singh [1997] 3 CLJ 694 ***(dist)***

Datuk Hong Kim Sui v. Tiu Shi Kian & Anor [1987] 1 CLJ 438; [1987] CLJ (Rep) 1 ***(dist)***

Iberian Trust Ltd, v. Founders Trust & Investment Company, Limited [1932] 2 KB 87 ***(refd)***

Kesatuan Pekerja-pekerja Perusahaan Dunlop Malaysia v. Md Jaafar Abdul Carrim & Anor [1998] 1 CLJ Supp 454 ***(refd)***

The Malayan Bar v. Tan Sri Dato' Abdul Hamid Omar [1989] 2 CLJ 373; [1989] 1 CLJ (Rep) 92 ***(refd)***

Yukilon Manufacturing Sdn Bhd & Anor v. Dato' Wong Gek Meng & Ors (No 4) [1998] 4 CLJ Supp 319 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 24 r. 7(4), O. 45 r. 5(ii), (iii), 7(3)(a)

For the plaintiff - Mahadevi Nadchatiram (Shanti Segaram); M/s Mahadevi Nadchatiram & Partners

For the defendant - Khoo Guan Huat (Eow Kean Fatt); M/s Skrine

Reported by Raja Vishnu Sivarajah

JUDGMENT

Arifin Zakaria J:

On 24 July 2000 this court granted an *ex parte* injunction order ("the Order") prohibiting the defendant, its agents or servants from using the name "Tiger Powerhitz" in the following concerts sponsored and carried out by the defendant on:

(i) 27 July 2000 at the Dewan Jubli Man (Baru) Segamat;

(ii) 29 July 2000 at SJK @ Tuan Poon School;

(iii) 30 July 2000 at Dewan Raya Gelang Patah, Gelang Patah, Johor; and

(iv) 3 August 2000 at Hokkien Association Hulu Klang,

or in charity show, event, presentation in any manner carried out by the defendant using the name "Tiger Powerhitz." The plaintiff alleged that the defendant failed to comply with the Order by:

(a) placing advertisements in the Sin Chew Jit Poh and Quang Ming Daily on 27 July 2000, and

(b) publishing a magazine entitled "Tiger Powerhitz" on 28 July 2000.

On 30 November 2001, the plaintiff obtained an *ex parte* order from this court for leave to institute contempt proceedings against Michael Daniel Van Der Poel, one of the directors of the defendant company, for breach of the Order.

On 24 January 2002, the defendant and Micheal Daniel Van Der Poel ("the alleged contemnor") filed an application (encl. 47) to set aside the Order dated 30 November 2001. The said application and the plaintiff's notice of motion were heard together. After hearing submissions of counsel for the parties I allowed the the said application with costs and struck out the plaintiff's notice of motion with no order as to costs.

My grounds for allowing the defendant's and the alleged contemnor's application are as follows.

The Alleged Contemnor Was Not Personally Served With A Copy Of The Order.

Order 45 r. 7(3)(a) Rules of the High Court ("the RHC") 1980 states that an order requiring a body corporate to do or abstain from doing an act shall not be enforced as mentioned in O. 45 r. 5(ii) and (iii) unless a copy of the order has been served personally on the officers against whose property leave is sought to issue a writ of seizure and sale or against whom an order for committal is sought. It was contended for the defendant and the alleged contemnor that the defendant and the alleged contemnor were never personally served with the Order and as such the defendant and the alleged contemnor had no notice of the terms of the Order. Further it is common ground that the alleged contemnor was not present when the Order was made; and nor was he ever notified of the terms of the order, either by telephone, telegram or otherwise. It is also not in dispute that the alleged contemnor was away in Australia on his annual leave during the period between 18 July 2000 to 8 August 2000 during which the order was made by the court. Thus, on the facts before me I find the plaintiff failed to satisfy this court that the alleged contemnor had been notified of the terms of the order by telephone or telegram or he was otherwise made aware of the terms of the Order.

In his submission the learned counsel for the plaintiff sought to rely on the case of *Class One Video Distributors Sdn Bhd & Anor v. Chanan Singh Sher Singh* [1997] 3 CLJ 694 where at p. 700 Haidar Mohd Noor J, (as he then was) said:

> In this case though the Order was not personally served on the second defendant, I am satisfied that the second defendant having had the benefit of Counsel's advice, is deemed to know the terms of the Order. In any event the second defendant did not deny that he had no knowledge of the terms of the Order. The word 'otherwise' in r. 7(6) would be wide enough to cover this situation.

I find that the facts of the abovementioned case can be distinguished from the present case as the alleged contemnor here had categorically denied knowledge of the terms of the Order and further he had also expressly stated in his affidavit (encl. 46) that he was not notified by his solicitors of the terms of the Order.

Similarly with the Privy Council case of *Datuk Hong Kim Sui v. Tiu Shi Kian & Anor* [1987] 1 CLJ 438; ([1987] CLJ (Rep) 1) which was cited by counsel for the plaintiff. In that case, the solicitors wrote to the client (alleged contemnors) about the terms of the order. However, the alleged contemnors chose not to abide by the injunction order. Moreover the second injunction order was served on the company 'Red Rose' on the same day.

As Sir Ivor Richardson stated at p. 440 (p. 4):

> Thus the Rules recognize that directors and officers are the human agencies responsible for the conduct of the affairs of companies. They fix a director with liability for the conduct of the company and so with liability for any breach by the company of an injunction **where the director has appropriate notice** that he is liable to process of execution if the company disobeys the order. (Emphasis added).

In the present case there is no evidence before the court indicative of the fact that the director had any appropriate notice of the Order.

For the above reasons it is my finding that the alleged contemnor had not personally been served with the Order nor had he been given the appropriate notice. Therefore, in the circumstances, I hold that he could not be held liable for contempt of the Order.

There Was No Proper Penal Endorsement.

It is not in dispute that the order does not contain the proper endorsement as required by O. 24 r. 7(4) and Form 87 of the RHC 1980. The plaintiff contended that this not fatal to the application. The case of *Class One Video Distributor Sdn Bhd v. Chanan Singh Sher Singh & Anor (supra)* was cited in support of his contention.

In that case YA Dato' Haidar Mohd Noor at p. 701 stated:

> In the circumstances I am of the view, following *Allport Alfred James* case, which cited with approval the English case of *Sofroniou*, that the defendant in not complying with the endorsement of the penal notice is not fatal so long as the second defendant **had knowledge** of the terms of the Order. (Emphasise added.)

What can be discerned from that case is that so long as the alleged contemnor had knowledge of the terms of the Order, the non endorsement of the penal notice is not fatal. However, in the present case it has been established that the alleged contemnor had no knowledge of the terms of the Order. Therefore, the authority cited could not support the plaintiff's argument.

In this context reference should also be made to the case of *Yukilon Manufacturing Sdn Bhd & Anor v. Dato' Wong Gek Meng & Ors (No 4)* [1998] 4 CLJ (Supp) 319, there Abdul Malik Ishak J at p. 327 states in no uncertain term:

> Difference penal notices should be used in cases of mandatory and prohibitory orders and also in a case where the order is against an individual or a corporation. In the case of an order against a company or a corporation, the penal notice must be specific and should name all the directors and officers of the company or corporation and that order should be served on each and every person named in the penal notice.

I wholly agree with the view of the learned judge and for the same reasons the court order of 30 November 2001 ought to be set aside.

Ambiguity In The Order

It is evident that the purpose of the Order was to restrain the defendant from using the name of "Tiger Powerhitz" in the Tiger Powerhitz Charity Show Concerts held between 27 July 2000 to 3 August 2000 at the specified venues. It is contended for the defendant and the alleged contemnor that the Order did not expressly state that the defendant is restrained from advertising the same or publishing the Tiger Powerhitz magazines. It is argued that in view of the apparent ambiguity in the Order, therefore, the defendant and the alleged contemnor could not be held liable for the alleged breach of the Order.

In the case of *Iberian Trust Ltd, v. Founders Trust & Investment Company, Limited* [1932] 2 KB 87, Luxmore J stated at p. 95:

> From this it appears that in order to constitute a contempt of Court to which the directors may be punished there must be wilful disobedience either by the company or its servants or directors to do something which it has been ordered to do. Now, turning back ro Rowlatt J's order, what is it that the defendant company have been ordered to do which the company and its directors have failed to do? In terms, the order does not direct the defendant company to do anything – it says: ... 'that the plaintiffs do have a return of the said shares within fourteen days.' Am I to spell out of that an order on the defendant company to do something? I think not. If the court is to punish anyone for not carrying out its order, the order must be in unambiguous terms direct what is to be done.

The same principle has been adopted in the case of *Kesatuan Pekerja-pekerja Perusahaan Dunlop Malaysia v. Md Jaafar bin Abdul Carrim & Anor* [1998] 1 CLJ (Supp) 454 where his lordship Nik Hashim J at pp. 457-458 stated.

> First and foremost, it must be emphasized that committal is a very serious matter. The courts must proceed very carefully before they make an order to commit to prison; and rules have been laid down to secure that the alleged contemnor knows clearly what is being alleged against him and has every opportunity to meet the allegations (per Cross Jin *Re BCJA) (An Infant)* [1965] 1 Ch 1112).
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> The rules governing the application for an order of committal is provided for under O. 52 of the RHC. Authorities have shown that the procedural rules must be complied with and be strictly enforced. Lord Denning MR in *Mcllraith v. Grady* [1968] 1 QB 468 at pg. 477 said:
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> > We must remember the fundamental principle that no man's liberty is to be taken away unless every requirement of the law has been strictly complied with '... It is also the law that the grounds on which an order of committal is sought must be set out in the statement accompying the notice of motion (see O. 52 r. 2(2) and O. 52 r. 3(3). Although there is no requirement for the notice of motion to set out the grounds, nevertheless this information must be stated in the statement with sufficient particularity to enable the person alleged to be in contempt to meet the charge. The nature of the contempt must be identified and spelt out precisely. The person alleged to be in contempt must know what exactly he is said to have done or omitted to do which constitute a contempt of court (see *Children District Council v. Keane*)'.

In the present case I am satisfied that even though the Order did not expressly mention the acts complained of it is, however, clear from its terms that the defendant is to be restrained from using the name "Tiger Powerhitz". Therefore, in my opinion, it is not open to the defendant to argue that the advertisements and the publication of Tiger Powerhitz magazine fall outside the ambit of the order. However, I am satisfied with the explanation given by the defendant that all the necessary measures and steps that need to be taken were taken by the defendant to ensure compliance with the order the moment defendant was made aware of the order but due to shortage of time the advertisements in both Sin Chew Jit Poh and Quang Ming Daily on 27 July 2000 and the publication of the magazine on 28 August 2000 could not be stopped. The detail explanation is found in paras. 25, 32 and 34 of the affidavit of the alleged contemnor in encl. (53.)

Delay

The other factor to be considered is the delay in making the application by the plaintiff. In this case there was a delay of almost 15 months by the plaintiff in filing the application for leave to institute committal proceedings. The plaintiff did not offer any explanation for the delay. In the case of *The Malayan Bar v. Tan Sri Dato' Abdul Hamid bin Omar* [1989] 2 CLJ 373; [1989] 1 CLJ (Rep) 92, the Supreme Court stated that contempt is a serious matter and should be pursued within a reasonable time. In that case, it was held that a lapse of nearly nine months was an inordinate delay. In the present case there was a delay of 15 months and no explanation was given by the plaintiff. In the circumstances I find that there has been an inordinate delay on the part of the plaintiff. This is clearly another factor which weighs against the plaintiff.

Conclusion

In the light of the above I am of the considered view that the defendant's and the alleged contemnor's application to set aside the leave granted to the plaintiff to commence committal proceedings against the alleged contemnor ought to be allowed and for the same reasons the plaintiffs substantive motion for committal be struck out. With regard to costs I order that the costs of this application to be paid by the plaintiff to the defendant and there will be no order as to costs as regard the plaintiff's motion for committal.